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**IN THE  
COURT OF APPEALS OF INDIANA**

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CHRISTOPHER KINDS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0612-CR-607
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE ST. JOSEPH SUPERIOR COURT  
The Honorable William H. Albright, Judge  
Cause No. 71D02-0503-FC-76, 71D08-0510-FC-306,  
71D01-0511-FB-158 & 71D03-0310-FB-112

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**May 21, 2007**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Christopher Kinds (“Kinds”) pleaded guilty in St. Joseph Superior Court to several offenses and was ordered to serve an aggregate sentence of eighteen years. He appeals and raises three issues, which we reorder and restate as:

- I. Whether the trial court abused its discretion when it denied Kinds’s motion to withdraw his guilty plea;
- II. Whether the trial court abused its discretion in weighing the aggravating circumstance of Kinds’s prior criminal history and in failing to assign mitigating weight to his guilty plea; and,
- III. Whether his aggregate sentence is inappropriate in light of the nature of the offense and the character of the offender.

Concluding that the trial court acted within its discretion in denying Kinds’s motion to withdraw his guilty plea and that Kinds’s sentence is not inappropriate, we affirm.

### **Facts and Procedural History**

On February 16, 2005, under cause number 71D03-0310-FB-112, Kinds pleaded guilty to Class B felony possession of cocaine within 1000 feet of a youth program center. He was sentenced to serve ten years, and the entire ten-year sentence was suspended to probation. Appellant’s App. p. 91. On March 9, 2005, Kinds was charged with Class C felony possession of cocaine and Class A misdemeanor possession of marijuana under cause number 71D02-0503-FC-76. In addition, the State filed a petition to revoke Kinds’s probation.

On October 18, 2005, Kinds was charged with two counts of Class A misdemeanor carrying a handgun without a license and two counts of Class C felony carrying a handgun without a license with a prior felony conviction under cause number

71D08-0510-FC-306. Finally, on November 30, 2005, Kinds was charged with Class B felony possession of cocaine within 1000 feet of a school, Class D felony resisting law enforcement, and Class A misdemeanor resisting law enforcement under cause number 71D01-0511-FB-158.

On May 25, 2006, Kinds entered into a plea agreement with the State. In the agreement, Kinds admitted to violating his probation in cause number 71D03-0310-FB-112. In cause number 71D02-0503-FC-76, Kinds pleaded guilty to a reduced charge of Class D felony possession of cocaine and the possession of marijuana charge was dismissed. In cause number 71D08-0510-FC-306, Kinds pleaded guilty to one count of Class C felony carrying a handgun without a license with a prior felony conviction and the remaining charges were dismissed. In cause number 71D01-0511-FB-158, Kinds pleaded guilty to Class D felony resisting law enforcement and the remaining charges were dismissed. Appellant's App. pp. 16-19.

On September 22, 2006, Kinds moved to withdraw his guilty plea. The trial court denied the motion and a sentencing hearing was held. At the hearing, the trial court found no mitigating circumstances and only one aggravating circumstance: Kinds's criminal history. For violating his probation in cause number 71D03-0310-FB-112, the court ordered Kinds to serve the balance of the previously suspended ten-year sentence. Kinds was ordered to serve two years for each Class D felony conviction and four years for his Class C felony carrying a handgun without a license conviction. All sentences were ordered to be served consecutive to each other for an aggregate sentence of eighteen years. Kinds now appeals. Additional facts will be provided as necessary.

## **I. Motion to Withdraw Guilty Plea**

Kinds asserts that the trial court abused its discretion when it denied his motion to withdraw his guilty plea. Specifically, Kinds contends that he moved to withdraw his plea because he is not guilty of the offense of carrying a handgun without a license.

Pursuant to Indiana Code section 35-35-1-4(b), after a defendant enters a plea of guilty, but before his sentence is imposed

the court may allow the defendant by motion to withdraw his plea ... for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant's plea.... The ruling of the court on the motion shall be reviewable on appeal only for an abuse of discretion. However, the court shall allow the defendant to withdraw his plea ... whenever the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice.

Ind. Code § 35-35-1-4(b) (2004).

Our supreme court has interpreted this statute to require a trial court to grant such a request:

only if the defendant proves that withdrawal of the plea “is necessary to correct a manifest injustice.” The court must deny a motion to withdraw a guilty plea if the withdrawal would result in substantial prejudice to the State. Except under these polar circumstances, disposition of the petition is at the discretion of the trial court.

Weatherford v. State, 697 N.E.2d 32, 34 (Ind. 1998) (citation omitted). The trial court's ruling on a motion to withdraw a guilty plea arrives in our court with a presumption in favor of the ruling. Id. One who appeals an adverse decision on a motion to withdraw must therefore prove the trial court abused its discretion by a preponderance of the evidence. Id. We will not disturb the court's ruling where it was based on conflicting evidence. Id.

At the hearing held on his motion, Kinds gave the following testimony concerning his desire to withdraw his plea to the carrying a handgun without a license charge:

Because I feel they're trying to charge seven people with three guns. I was outside the van, nowhere where the gun[] was, and I feel they're trying to charge me with a gun that I was nowhere in possession of it.

Tr. p. 22. However, Kinds also admitted that when the police officers stopped the van, they saw Kinds jump out of it. Tr. p. 23. Kinds also stated:

I was just trying to get my case over [by pleading guilty], but when I was out I was reading on my plea. I'm like, man, how they trying to charge seven people with three guns? They said they seen me throw a handgun, but on the camera -- I asked my lawyer to try to get the camera, but I guess they can't get the tape to see me throwing the handgun.

Tr. p. 24. Finally, Kinds testified that he understood the plea agreement, but he lied when he told the judge that he was guilty of possession a handgun without a license. Tr. pp. 24-25.

In situations where a defendant concedes guilt in one proceeding but later contradicts that admission by claiming he is innocent, our supreme court has observed:

An admission of guilt that is later retracted may nonetheless be reliable. Admissions of guilt and assertions of innocence come in many shades of gray, and the trial judge is best situated to assess the reliability of each. A credible admission of guilt, contradicted at a later date by a general and unpersuasive assertion of innocence, may well be adequate for entering a conviction.<sup>[1]</sup>

Carter v. State, 739 N.E.2d 126, 130 (Ind. 2000) (citation omitted); see also Johnson v. State, 734 N.E.2d 242, 245 (Ind. 2000) ("A trial court may [] accept a guilty plea from a defendant who pleads guilty in open court, but later protests his innocence."); Owens v. State, 426 N.E.2d 372, 375 (Ind. 1981).

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<sup>1</sup> We therefore reject Kinds's general assertion that "forcing a man who declares his innocence to be convicted without the benefit of trial would be manifestly unjust." Br. of Appellant at 14.

At the guilty plea hearing, Kinds testified that he read, signed and understood his plea agreement. Tr. pp. 4-5. He was advised of his rights and the potential penalty for each offense. Kinds admitted to having a prior felony conviction and to possessing a handgun without a license on the date charged. Tr. pp. 12-13. Despite Kinds's later claim of innocence, the trial court determined that Kinds's earlier assertion of guilt was more credible and reliable. It was within the trial court's discretion to do so, and therefore, we conclude that the trial court did not abuse its discretion when it denied Kinds's motion to withdraw his guilty plea.

## **II. Sentencing**

Kinds contends that the trial court “did not adequately consider aggravating and mitigating circumstances before entering its sentence” for Class D felony possession of cocaine in cause number 71D02-0503-FC-76.<sup>2</sup> Br. of Appellant at 9. In general, sentencing determinations are within the trial court's discretion. Cotto v. State, 829 N.E.2d 520, 523 (Ind. 2005). If the trial court relies on aggravating or mitigating circumstances to enhance or reduce the presumptive<sup>3</sup> sentence, it must (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate the court's evaluation and balancing of the circumstances. Id. at 523-24.

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<sup>2</sup> Kinds has not raised any argument with regard to his two-year sentence for Class D felony resisting law enforcement in cause number 71D01-0511-FB-158.

<sup>3</sup> In 2005, in response to Blakely v. Washington, 542 U.S. 296 (2004), our General Assembly amended the sentencing statutes to provide for advisory rather than presumptive sentences. Because Kinds's offense of Class D felony possession of cocaine under cause number 71D02-0503-FC-76 occurred prior to the enactment of those new statutes, we apply the prior version. See Creekmore v. State, 853 N.E.2d 523, 528-29 (Ind. Ct. App. 2006).

### *A. Kinds's Guilty Plea*

Kinds argues that the trial court abused its discretion when it failed to assign any mitigating weight to his guilty plea. The significance of a guilty plea as a mitigating circumstance will vary from case to case. Francis v. State, 817 N.E.2d 235, 238 n.3 (Ind. 2004).

Here, in exchange for his plea of guilty to Class D felony possession of cocaine, the State agreed to dismiss the Class A misdemeanor possession of marijuana charge and reduce Kinds's Class C felony possession of cocaine charge, which carried a potential eight-year sentence. Kinds also pleaded guilty to two other offenses in the same plea agreement, and his guilty pleas in those two cases resulted in the dismissal of additional charges including a charge of Class B felony possession of cocaine. Thus, Kinds received a substantial benefit from the plea. Under these circumstances, the trial court was not required to give significant mitigating weight to Kinds's guilty plea and its failure to specifically state that his guilty plea was a mitigating factor amounts to harmless error. Banks v. State, 841 N.E.2d 654, 658-59 (Ind. Ct. App. 2006), trans. denied.

### *B. Kinds's Criminal History*

The trial court relied on Kinds's prior criminal history when it ordered him to serve a two-year sentence for his Class D felony possession of cocaine conviction, a sentence six months more than the presumptive one and one-half year sentence. See Ind. Code § 35-50-2-7 (2004 & Supp. 2006). In assigning weight to a defendant's criminal history, courts must consider the chronological remoteness of any prior convictions as well as the gravity, nature, and number of prior crimes. Haas v. State, 849 N.E.2d 550, 556 (Ind. 2006).

Between 1996 and 2002, Kinds had several juvenile adjudications for committing acts that would have been crimes if committed by an adult. In 2004, Kinds was convicted of two misdemeanors: driving without a license and false informing. In 2005, Kinds pleaded guilty to Class B felony possession of cocaine, and he violated his probation in that case when he committed the instant offense. We therefore conclude that Kinds's criminal history is significant, and the trial court did not abuse its discretion when it ordered Kinds to serve two years for his Class D felony possession of cocaine conviction.

*C. Inappropriate Sentence*

Finally, Kinds contends that his aggregate eighteen-year sentence is inappropriate. Appellate courts have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, the court concludes the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B) (2007), Marshall v. State, 832 N.E.2d 615, 624 (Ind. Ct. App. 2005), trans. denied.

Initially, we observe that ten years of Kinds's aggregate eighteen-year sentence were imposed due to Kinds's probation violation in cause number 71D03-0310-FB-112. Our court does not review probation revocation sentences for inappropriateness under Appellate Rule 7(B).<sup>4</sup> See Sanders v. State, 825 N.E.2d 952, 957 (Ind. Ct. App. 2005), trans. denied. Accordingly, we consider only whether Kinds's sentences for Class D

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<sup>4</sup> Moreover, we observe that the trial court clearly acted within its discretion when it ordered Kinds to serve the entire ten-year suspended sentence as Kinds violated his probation shortly after he was sentenced by committing the same offense for which he was convicted: possession of cocaine.



felony possession of cocaine, Class D felony resisting law enforcement<sup>5</sup> and Class C felony carrying a handgun without a license are inappropriate.

Concerning the nature of the offenses, the record offers little detail concerning the nature of the offenses as Kinds essentially admitted only to the facts contained in the charging information when he pleaded guilty. However, we observe that these offenses were committed within nine months of each other, and that Kinds possessed cocaine within a month of receiving his ten-year suspended sentence for Class B felony possession of cocaine. Moreover, Kinds's juvenile and adult criminal histories demonstrate his inability to lead a law-abiding life. For these reasons, we conclude that Kinds's sentences for these offenses are supported by the character of the offender and his aggregate sentence is appropriate.

### **Conclusion**

The trial court did not abuse its discretion when it denied Kinds's motion to withdraw his guilty plea. The trial acted within its discretion when it relied on Kinds's criminal history to enhance his sentence for Class D felony possession of cocaine. Moreover, Kinds's aggregate eight-year sentence for his Class D felony possession of cocaine conviction, Class D felony resisting law enforcement conviction, and Class C felony carrying a handgun without a license conviction is not inappropriate.

Affirmed.

DARDEN, J., and KIRSCH, J., concur.

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<sup>5</sup> We reject Kinds's argument that his two-year sentence of resisting law enforcement is inappropriate because the trial court failed to specifically mention his criminal history in imposing an enhanced sentence. From the record of the sentencing hearing, it is clear that the trial court considered Kinds's criminal history to be aggravating.